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IN THE

Supreme Court of the United States

October Term, 1977

No. 57-1479

DONALD R. PLUNKETT,

Petitioner,

vs.

CITY OF LAKWOOD,

Respondent.

**Petition for Writ of Certiorari to the California Court
of Appeal, Second Appellate District.**

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DONALD R. PLUNKETT,

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**Petition for Writ of Certiorari to the California Court
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I.

Introduction.

Petitioner, Donald R. Plunkett, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal in the consolidated cases of Donald R. Plunkett, Plaintiff, Cross-Defendant and Appellant, v. City of Lakewood, Defendant, Cross-Complainant, and Respondent and Donald R. Plunkett, Plaintiff, Appellant, v. City of Lakewood, Defendant, Respondent, Case No. 49610. The Supreme Court of the State of California denied a Petition for Hearing in the case by an Order dated January 19, 1978.

II.
Opinions Below.

A. The Opinion of the California Court of Appeal dated November 15, 1977, is attached hereto as *Appendix "A"*. A Petition for Rehearing was timely filed and denied by the California Court of Appeal on December 9, 1977.

B. A petition for hearing was timely filed with the Supreme Court of the State of California which petition was denied by the Supreme Court pursuant to an order dated January 19, 1978. A copy of that Order is attached hereto as *Appendix "B"*.

III.
Grounds on Which Jurisdiction Is Invoked.

A. The date of the decision of the California Court of Appeal is November 15, 1977. A Petition for Rehearing was timely filed with the California Court of Appeal, which petition was denied on December 9, 1977. A Petition for Hearing to the Supreme Court of the State of California was denied by that Court on January 19, 1978.

B. The statutory provision concerning jurisdiction of this court to review the decision of the state court by writ of certiorari is Title 28, U.S. Code, Section 1257.

C. A judgment of an inferior state court may be reviewed where a writ of error to the highest court of the state has been denied. *Bacon v. Texas*, 163 U.S. 207, 41 L.Ed. 132 (1896).

IV.
Questions Presented for Review.

1. This Petition for Certiorari raises several questions under the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643.

A. Whether evidence obtained consisting of photographs taken and inspections made by City officials from a utility right-of-way abutting Petitioner's property which was licensed to and fenced by Petitioner, without either a warrant or emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution under the decisions in *Camara v. Municipal Court* (1967) 387 U.S. 523 and *See v. City of Seattle* (1967) 387 U.S. 541.

B. Whether evidence obtained consisting of photographs taken and observations made by City officials through the use of low flying helicoper overflights of the Petitioner's property, without warrant, emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment.

C. Whether inspections made by City officials on property owned by Petitioner but occupied by tenants without either a warrant or the consent of anyone residing in said premises constituted an unreasonable search within the meaning of the Fourth Amendment.

This Petition for Certiorari raises additional questions:

D. Whether the trial court improperly excluded evidence relevant to the assertion that the totality of the City official's actions against the Petitioner was a discriminatory enforcement of the laws of the City and State, thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the laws.

E. Whether California Evidence Code 352 which allows the court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will
(a) necessitate undue consumption of time or
(b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury was improperly applied in a non-jury trial by excluding evidence relevant to the assertion by the Petitioner that he had been subject to discriminatory enforcement of zoning regulations by the City of Lakewood officials thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the law.

V.

Constitutional and Statutory Provisions Involved.

A. Article IV of the Amendments to the Constitution of the United States provides that:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated;

and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. Article XIV, Section One, of the Amendments to the Constitution of the United States provides in part:

"(N)or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

C. Section 352 of the Evidence Code of the State of California which was in effect at the time of this case provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will
(a) necessitate undue consumption of time or
(b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

D. Section 1822.50 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

"An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, or zoning."

Section 1822.57 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

"Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor."

Section 1822.55 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

"An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void."

VI.

Statement of the Case.

Petitioner was the owner of property consisting of Lots 1 through 7, generally described as 6101, 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson in the City of Lakewood, California. These properties were constructed as single family dwelling houses and garages and were in the unincorporated territory of the County of Los Angeles. On September 25, 1962 the aforementioned property of the Petitioner was annexed to the City of Lakewood by Ordinance. Subsequent to the 1962 annexation Petitioner's structures remained more or less out of official scrutiny, inspection or investigation until on or about November 1969 when inspectors of the City of Lakewood sought permis-

sion to enter the premises which was denied by Petitioner. They again tried to enter the premises on November 21, 1969 and were again denied permission and thereafter requested an inspection warrant which was issued by a Judge of the Los Cerritos Municipal Court pursuant to the provisions of Sections 1822.50 *et seq.* of the Code of Civil Procedure of the State of California on November 28, 1969 which permitted the inspectors to make inspection of the premises, lots, buildings and structures, including the rear yards thereof, and all areas enclosed by fences, as well as the interiors of any of the buildings or dwellings located at 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson in the City of Lakewood, California. At the appointed time and place the inspectors came on the property and began their inspection but were discovered by the Petitioner who denied them further access to the premises. The City of Lakewood requested that the County Sheriff cite the Petitioner for refusal to allow the City to inspect the property under the inspection warrant pursuant to Section 1822.57 of the Code of Civil Procedure of California, a misdemeanor. Petitioner was found guilty on the charge and sentenced to ten days in the County Jail, sentence suspended and placed on summary probation on condition that he provide entrance to the property named in the warrant in Case No. M37030.

Petitioner sought and obtained an alternative writ of prohibition from the Superior Court, Los Angeles County, California. The City of Lakewood. Respondent herein, was named as the Real Party in Interest. The case was never heard and finally went off calendar when Petitioner's conviction in M37030 was *reversed*, by a decision of the Appellate Department of the

Superior Court of Los Angeles on the basis that the warrant was too broad and that there was no limitation to the inspection called for and for failure to give adequate prior notice required under the California Statute.

On August 18, 1970 inspectors of the City of Lakewood filed a complaint in the Los Cerritos Municipal Court alleging that Petitioner was guilty of four counts of unlawfully operating rental units under applicable sections of the Lakewood Municipal Code and of unlawfully maintaining an interior lot without providing required side yard, in the case of *People v. Plunkett*, No. M39760.

Pursuant to a stipulation it was established that City officials observed the aforementioned properties both from the ground and two helicopter overflights during the summer of 1970. The observations on the ground were made from the Southern California Edison Company right-of-way by obtaining "permission" from the Edison Company representative who accompanied the inspectors through a locked gate and wall surrounding the property which had been for years licensed to the Petitioner by Edison Company thus enabling the inspectors to inspect and photograph the Petitioner's property abutting from the licensed Edison right-of-way.

Petitioner was found guilty after jury trial on February 16, 1971 of ten counts of misdemeanors, involving operating rental units in violation of the Lakewood Municipal Code and maintaining interior lots without providing the side yards required by the Municipal Code and was directed to pay a fine in the aggregate of \$2,000 or to serve 364 days in the County Jail. An appeal was taken from the judgment of conviction to the Appellate Department of the Superior Court

of Los Angeles County and on May 11, 1972 the Appellate Department affirmed the judgment without written opinion. After the Appellate Department refused Plaintiff's petition for rehearing or certification to the Court of Appeal of the State of California, Petitioner sought a Writ of Habeas Corpus in the United States District Court, Central District of California, in the case *Plunkett v. Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California*, Case No. 72-1933 RJK to discharge Petitioner sought a Writ of Habeas Corpus to discharge him from the judgment on the basis that the Municipal Court misdemeanor conviction was procured in violation of Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by reason of evidence procured and used in the Municipal Court case consisting of photographs of Petitioner's property from a police helicopter and under California Code of Civil Procedure, Sections 1822.50 *et seq.* (enacted in 1968 to meet the new constitutional directives made necessary by the companion cases of *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967) holding that a search warrant is required for regulatory searches wherein entry is refused by the occupant). After the first inspection warrant was partially executed then ruled invalid no further inspection warrant was sought or obtained by the City of Lakewood officials.

Petitioner, Donald R. Plunkett, then filed a civil complaint in the Superior Court on February 4, 1971 and requested a hearing on an application for a temporary restraining order. The action was to enjoin the City of Lakewood from prosecuting the Plaintiff for alleged violations of the City of Lakewood's zoning

ordinance in respect to the maintenance of improved real property owned by the Petitioner, consisting of seven lots and structures thereon in the City of Lakewood, California.

Petitioner filed an additional action in the same court on August 25, 1972. In this second action Petitioner sought declaratory relief to determine the validity and construction of the ordinances of the City of Lakewood, and a permanent injunction to restrain the City of Lakewood from enforcing its zoning ordinance in respect to the property owned by the Petitioner. Petitioner alleged that he was the sole proprietor and owner of a license from the Southern California Edison Company, and that a controversy existed between Petitioner and the City as to the number of horses that Petitioner could maintain on said property and that the City was threatening to prosecute Petitioner from maintaining said horses and an injunction was sought.

The Defendant City in its answer to the complaint admitted that Plaintiff's land and the land subject to the Southern California Edison Company license were annexed by the City of Lakewood in 1962, and that there was a controversy between Petitioner and Defendant over the grazing of horses on said land; and that it had authorized criminal prosecution against the Petitioner for violation of its ordinance, and otherwise denied the material allegations of the complaint. A preliminary injunction enjoining the Defendant City from criminally prosecuting Petitioner for alleged violations of the Lakewood Municipal Code was granted.

Defendant City was then permitted to file a cross-complaint seeking an injunction against a catalogue of alleged illegal uses by Petitioner, chiefly, using a

single family residential property for multiple family uses—in addition to the matter of Petitioner's horse grazing.

The dispute was presented at a trial which started in January 1975, and in July 1976 the trial court utilizing the evidence obtained without a warrant over the objections of Petitioner then filed its findings of fact and conclusions of law resulting in a judgment in favor of the City on the two cases which had been consolidated for trial.

The judgment provides, in summary, that Petitioner is enjoined from constructing, using, occupying or maintaining more than one single family residence on any of the seven lots; must provide for each lot a garage or carport with at least two storage spaces; must provide in connection with construction of any new building or alteration of an old building a side yard and a rear yard in accordance with the City's Code; must, after the present license to use the Southern California Edison Company right-of-way expires, maintain animals on such property only in accordance with the City's Code; may not occupy any building or structure unless and until a certificate of occupancy is obtained; may not use the properties for other than a single family residence with specified limitations on roomers or boarders; must reconvert several former garages to garages; must remove a carport installed so that a use of a garage is not blocked; must remove a solid wall and must obtain a permit for a swimming pool on the premises. The Court of Appeal of the State of California affirmed the decision of the trial court.

On January 14, 1977, the United States District Court dismissed the petition for habeas corpus without

considering the Fourth Amendment claim. On January 19, 1977 Petitioner filed a notice of Appeal to the Ninth Circuit, United States Court of Appeals from the District Court's order entered January 14, 1977 dismissing the habeas corpus petition. The United States Court of Appeals for the Ninth Circuit made its order filed November 16, 1977 granting Petitioner's application for a certificate of probable cause to appeal the denial of this habeas corpus petition. The matter is still pending in the United States Court of Appeals for the Ninth Circuit No. 77-8074 entitled Donald R. Plunkett, Petitioner, v. The Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California.

VII.

Grounds and Reasons for Granting Writ of Certiorari.

A. Evidence obtained consisting of photographs taken and inspections made by City officials from a utility right-of-way abutting Petitioner's property which was licensed to and fenced by Petitioner, without either a warrant or emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution under the decisions in *Camara v. Municipal Court* (1967) 387 U.S. 523 and *See v. City of Seattle* (1967) 387 U.S. 541.

B. Evidence obtained consisting of photographs taken and observations made by City officials through the use of low flying helicopter overflights of the Petitioner's property, without warrant, emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment.

C. Inspections made by City officials on property owned by Petitioner but occupied by tenants without either a warrant or the consent of anyone residing in said premises constituted an unreasonable search within the meaning of the Fourth Amendment.

By the companion cases of *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), a search warrant is required for regulatory searches where entry is refused by the occupant. In *Camara*, the United States Supreme Court applied the requirement of a regulatory search to the search of residential areas. The *See* case, *supra*, required the issuance of a search warrant for the regulatory inspection of commercial areas. It was further made clear that the rule was not confined to criminal prosecutions. The court held that the businessman, like the occupant of a residence, has a right to be free from unreasonable official entries.

To meet the new constitutional directives, a new form of search warrant was devised, and a procedure for its use was specified, by the 1968 California Legislature (CCP §§1822.50 *et. seq.*).

A warrant was obtained by the City under these sections but was later quashed and the inspections complained of herein then took place without a new warrant being sought.

We have before this Court a warrantless inspection of housing and business premises in a nonemergency situation and without consent.

The California Court of Appeal stated in its decision that:

"The bulk of Plaintiff's brief on appeal is devoted to challenging evidence allegedly obtained

in violation of his constitutional right. None of his contentions has merit." (Appendix A, Page 6).

"There is no merit to Plaintiff's contention that the overflights constituted an invasion (*sic*) of his privacy. First, the initial patrol overflight was not a search." (Appendix A, Page 7).

"Moreover, Plaintiff cannot have a reasonable expectation of privacy with respect to objects as conspicuous as garages and residences." (Appendix A, Page 8).

With respect to observations from the Edison property the Court of Appeal stated:

"Charles Chivetta photographed the rear of Plaintiff's property from the Edison right-of-way. Plaintiff contends that the evidence based on Chivetta's observations and photographs from the Edison right-of-way should have been suppressed because the City obtained the Edison Company's consent by coercion. There is no merit to that contention. Charles Chivetta wrote to John Overmeyer, a representative of the Edison Company and informed the Edison Company, in substance, that Plaintiff was unlawfully keeping horses on property controlled by Edison and if the City were to file a complaint, Edison would be named as a party. Rather than coercion, the Edison Company's willingness to permit Defendant's representatives on its property reflects only a desire to obey the law or a desire to cooperate with the City because the Company knew it was not disobeying the law." (Appendix, Page 8).

By stipulation between the parties in the case *sub judice* the helicopter overflights were made without a warrant:

"By police aircraft for the *specific purpose* of viewing Mr. Plunkett's property and that because of zoning violations (the inspector) had observed, (the inspector) subsequently ordered with the concurrence of the City administration another overflight with the specific intent to photograph those violations. These overflights were not of an ordinary occurrence, only two having been made in the last year, and *both of them were to view Mr. Plunkett's property*; that (the inspector) was not allowed by Mr. Plunkett to inspect the property and that at the date he testified in the case . . . M 39767, (the inspector) was on the rear portion of the property for the very first time with the jury in that case.

That what was apparent from the outside was enough for him to request a police helicopter and along with himself overfly Mr. Plunkett's property and make observations therefrom *for the specific purpose of locating violations of the zoning code*.

That when he saw the extent of the apparent violations he determined he would have to prosecute.

That he sent a photographer out in another Sheriff's helicopter to overfly Mr. Plunkett's property and take pictures; that this was the only way and the best way to show what actually existed on Mr. Plunkett's property in that he, the witness, had been denied access to it by Mr. Plunkett."

The California Court of Appeal decision states:

"Apparently, it was not until Michael White's helicopter flight in 1969 that the violations become apparent. *This was at least in part because Plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property.*"
(Emphasis added.)

The Court of Appeal concluded that the Petitioner (and tenants of the other houses) did not have a reasonable expectation of privacy.

The decision of the Court of Appeal with reference to the observations and photographs from the Edison right-of-way does not deal with or discuss the error (mentioned in Appellant's Opening Brief in the Court of Appeal) that the photographs taken in and observations made from the Edison right-of-way abutting the Plaintiff's property and over which the Plaintiff had an exclusive license or lease, and around which as the Opinion states "Plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property", constituted an illegal inspection under *Camara* and *See*. In *Chapman v. United States*, 365 U.S. 610 (1961), similar to *Stoner v. California*, 376 U.S. 483 (1964), it was made clear that a landlord may not, absent "exigent circumstances" (to render aid, e.g.) consent to a search of the premises of his tenant, even to view waste or abating nuisance on the premises. Whether the Edison Company acceded (voluntarily or not) to the inspector's request to come on the land, cannot serve to validate the City of Lakewood's conduct. It is not the right of privacy of Edison Company, but of the Petitioner that is at issue, and thus it would be untenable to conclude

that the Edison Company, a neutral entity with no significant interest in the matter, may validly consent to an invasion of its lessee's rights.

The Edison Company representative unlocked the eight foot fence, and admitted the City of Lakewood Inspectors. The inspector stated that the purpose of the entry was to see if violations of zoning laws had been corrected and to take pictures of the abutting property. That the right-of-way was the only place where he could obtain the view to take the picture and in point of time, the entry was made without an inspection warrant, the original inspection warrant having been previously ruled invalid.

The area was invaded, although the Petitioner had taken all necessary steps to insure privacy by erecting an 8 foot wall with a locked gate. Secondly, it appears that the "consent" if it be such, obtained from the Edison Company to enter upon the right-of-way in order to view Petitioner's property was the result, as a matter of law, of coercion. In *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968) this court concerned itself with submission to a claim of lawful authority. The court determined that a response which is generated by a claim of lawful authority which does not exist is, as a matter of law, involuntary and therefore such consent is invalid. The courts of California follow the same principle. See *People v. Shelton*, 60 Cal.2d 74 (1964).

There is no evidence of consent of any of the occupying parties. A thorough discussion of the necessity for consent from the occupying parties occurs in *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964). In that case, the United States Supreme Court de-

terminated that a hotel clerk could not consent to the search of the room of an absent guest. In *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776 (1961) the Court similarly determined that a landlord did not have the ability to consent to the search of the tenant's property. These propositions have been forcefully followed by the California courts. See for example, *People v. Verbiesen*, 6 Cal. App. 3d 38 (1970); and *People v. Frank*, 225 Cal. App. 2d 339 (1964).

In the absence of such consent from those occupying the lots, the "inspection" must be regarded as an illegal search and the fruits of that search, of course, cannot be utilized. This principle must further be extended to the examinations of some of the structures on those lots. Thus, although the inspector testified he believed that some of the structures were occupied, he made no attempt to obtain consent from the occupants to examine the structures. Consequently, the entire inspection was pursued in violation of the Fourth Amendment rights of these individuals and should not have been used before the Superior Court.

D. The trial court improperly excluded evidence relevant to the assertion that the totality of the City official's actions against the Petitioner was a discriminatory enforcement of the laws of the City and State, thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any State action which denies citizens of States equal protection of the laws.

E. California Evidence Code Section 352 which allows the court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate

undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury was improperly applied in a non-jury trial by the court excluding evidence relevant to the assertion by the Petitioner that he had been subject to discriminatory enforcement of zoning violations by the City of Lakewood officials thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the law.

In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, this court considered a claim of discriminatory enforcement brought by a laundry owner operating in a wood constructed building. The individual, Yick Wo, proved that 280 persons had applied for permits from the City of San Francisco but the permits had been granted to only 80 non-Chinese applicants and had been denied to the 200 Chinese applicants. The United States Supreme Court found discrimination in the application of the ordinance, even though it found the ordinance valid on its face.

In *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) the Court of Appeals for the Fourth Circuit reversed a conviction for disorderly conduct because the defendants, who were protesting the war in Vietnam, were less noisy than other groups (military bands) who were not prosecuted. The court suggested that whether the defendants raise an inference of discrimination, the burden of proof should switch to the government to justify the selective enforcement. *Id.*

"It is neither novel nor unfair to require the party in possession of the facts to disclose them.

We think that defendants make a sufficient *prima facie* showing that application of the noise and obstruction regulation to them was pretensive and that the government being in possession of the facts as to noise and obstruction of approved activity, should have come forward with evidence, if it could, to rebut the entrance of a double standard." *Id.* at 1078.

In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) the Court of Appeals for the Seventh Circuit adopted the approach suggested in *Crowthers*. Upon a showing of reasonable doubt, the court shifted the burden to the prosecution to provide compelling evidence that the decision to prosecute was arrived at in good faith. *Id.* at 623-624.

The court disapproved of the frequent practice of simply

"Dismissing all allegations of illegal discrimination in the enforcement of criminal laws with a reference to . . . (the statement) that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution." *Id.* at 624.

The Defendant in *Falk* was convicted of failure to possess a selective service card. The evidence showed that 25,000 men who turned in their draft cards were not prosecuted. *Id.* at 621. In addition, the Selective Service had a policy of not prosecuting violators of the card possession regulation. 479 F.2d at 623. Additional evidence showed that the government was opposed to the Defendant's draft counseling service. *Id.* at 621. The Court in *Falk* found this evidence established a *prima facie* case of improper discrimina-

tion, and the court shifted the burden to the prosecution to show that its motives were proper. *Id.* at 624.

Evidence of discriminatory enforcement usually lies buried in the consciences and files of law enforcement agencies and must be ferreted out by the defendant.

The first obstacle is showing intentional or deliberate discrimination. The United States Supreme Court emphasized this element in *Snowden v. Hughes*, 321 U.S. 1 (1944) (alternate holding) which stated that

"[t]he unlawful administration by state officers of a state statute . . . resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Id.* at 8.

The court here improperly excluded evidence relevant to the assertion of the claim that the totality of the City of Lakewood's action against the Petitioner was the result of discriminatory enforcement of the laws of the City of Lakewood, thereby depriving Petitioner of due process of law pursuant to the Fourteenth Amendment to the United States Constitution.

The City official testified in this case that in 1974 the City of Lakewood performed approximately 28,000 inspections of property such as Petitioner's which resulted in not one single criminal prosecution for alleged zoning violations, even though zoning violations did indeed exist.

The Court of Appeal of California in its Opinion (Appendix A, Page 9) states "Plaintiff's theory throughout was that he had been the subject of discriminatory enforcement of zoning violations."

The record reflects that the Petitioner was prosecuted in the Municipal Court for alleged zoning violations at the request of the City. During the course of the trial at bench, Petitioner's counsel attempted to inquire of the city inspector concerning a procedure involving a notification form being sent to a property owner if a permit existed for a particular structure, but no final permit had been obtained. Petitioner's counsel inquired whether the City had brought any civil actions to force persons to get final permits when those persons had been notified by mail under the notification system. The City objected and the court sustained the City's objection on the basis of "relevancy." By way of offer of proof Petitioner's counsel asserted that the evidence was relevant to a claim of unequal protection and discriminatory enforcement in view of the fact that:

" . . . for the last two years they have been notifying people that they are supposed to get a final on certain property and, furthermore, that apparently Plunkett is the only one who has ever been sued over the matter and I would offer to prove that that is true in this case.

" . . . we did want to note that the offer of proof would be through this witness and others that Mr. Plunkett has been having a running battle with the City of Lakewood since 1960, that he has been running for City Council, that he is presently running again for City Council, that the prosecution in this case of Mr. Plunkett is discriminatory.

" . . . and that Mr. Plunkett has been a thorn in the side of the power structure in Lakewood and they brought this action primarily for that purpose and that it denies him equal protection of

the laws and it is discriminatory prosecution which we have already shown with respect to the innumerable criminal prosecutions, and further, this is the only case the City of Lakewood has ever had going against anyone for an alleged violation—civil case in Superior Court of setback requirements or failure to have final inspections on any properties."

The record shows that Petitioner was prosecuted by the City of Lakewood and was

"twice found guilty in the Municipal Court of violating Defendant's code, . . ." Appendix A, Page 5).

Petitioner was prosecuted in the Superior Court action for constructing a four foot chain link fence in violation of a 42" height limitation of the City and for his construction of a six foot fence in violation of applicable laws

"with the purpose and intent of maintaining therein his own domain, immune from City regulation, inspection or City laws." (Appendix A, Page 5).

The Opinion of the Court of Appeal of the State of California then states,

"There was no evidence that the City was harassing the Plaintiff." (Appendix A, Page 5).

No further evidence was introduced by virtue of the Court's ruling that such evidence was not "relevant" and thereby inadmissible.

Petitioner contends that having made a *prima facie* showing by way of offer of proof and foundation that the City of Lakewood in 1974 performed 28,000 inspections which resulted in not one single criminal

prosecution nor civil prosecution, that the Petitioner was deprived of due process of law by the refusal of the trial court to allow Petitioner to establish or at least to attempt to establish beyond that which was already shown a deliberate invidious discrimination against him by prosecutorial authorities of the City of Lakewood. This discriminatory enforcement defense did not rest simply upon allegations of laxity of enforcement, instead, Petitioner clearly alleged that the City of Lakewood law enforcement authorities undertook a practice of "intentional, purposeful and unequal enforcement of penal and civil statutes against him."

VIII.
Conclusion.

"Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion . . . Judicial implementations of the Fourth Amendment may need constant accommodations to the ever intensifying technology of surveillance . . . Reasonable expectations of privacy may ascend into the airspace and claim Fourth Amendment protection." (*Dean v. Superior Court* (1973) 35 Cal. App. 3d 116.

This issue should be resolved by the United States Supreme Court. It affects programs which are aimed at securing city wide compliance with minimum physical standards and as the dissenting opinion (three Justices) stated in the *See v. Seattle* case, *supra*, the warrant procedure strikes down hundreds of city ordinances, jeopardizes the health, welfare and safety of millions of people and "sets up in the health and safety codes

area inspection of a new-fangled 'warrant' system that is entirely foreign to Fourth Amendment standards."

Balanced against the need for prosecutorial discretion, is society's interest in seeing that laws are uniformly enforced and that the integrity of the judiciary branch is thereby maintained.

Justice Brandeis once wrote that

"(Our Government) teaches the whole people by its example . . . if the Government becomes a law breaker, it breeds contempt for laws; it invites every man to become a law unto himself; it invites anarchy (*Olmstead v. United States*, 277 U.S. 438, 485 (1927) Brandeis, J. dissenting)."

It must be presumed that the legislatures intend that the laws they pass be impartially applied. The availability of discriminatory enforcement as a defense thus serves a good purpose; it acts as a constant reminder to the executive that the will of the people, expressed through the legislative branch, should be obeyed. These are the same purposes which have been articulated by the United States Supreme Court to justify the exclusionary rule on search and seizure cases.

For the foregoing reasons the petition for writ of certiorari should be granted and the decision of the California Court of Appeal should be reversed.

Respectfully submitted,

MAURICE HARWICK,
Attorney for Petitioner.

APPENDIX A.

Opinion of the District Court of Appeal.

In the Court of Appeal of the State of California,
Second Appellate District, Division Five.

Donald R. Plunkett, Plaintiff, Cross-Defendant, and
Appellant, v. City of Lakewood, Defendant, Cross-
Complainant, and Respondent.

Donald R. Plunkett, Plaintiff, Appellant, v. City
of Lakewood, Defendant, Respondent. 2 Civ. 49610
(Super.Ct. SEC 8296).

Filed November 15, 1977.

For many years, plaintiff and cross-defendant Donald R. Plunkett has been at odds with defendant and cross-complainant, City of Lakewood, over the uses to which he could put his property. This litigation started in 1972. Several years later, in July 1975, the trial court filed 200 pages of findings of fact and conclusions of law resulting in a 17 page judgment in favor of the city. In short, plaintiff was enjoined from his numerous illegal uses of his property and denied any relief whatsoever on his own complaints. This appeal involves two cases consolidated for trial which, to simplify matters, we treat as one action.

In August 1972, plaintiff filed a complaint seeking declaratory and injunctive relief with respect to his use of his property to graze horses in excess of that number permitted under defendant's Municipal Code. A preliminary injunction was granted in September 1972. Defendants were then permitted to file a cross-complaint seeking an injunction against a catalog of illegal uses by plaintiff—chiefly, using a single-family residential property for multiple family uses—all this in addition to the matter of plaintiff's horse grazing.

In February 1971, plaintiff had filed another action to enjoin defendant from criminally prosecuting him for various violations of defendant's Municipal Code. This complaint was amended to seek declaratory relief concerning plaintiff's use of his property. Plaintiff also sought a declaration of rights concerning his claimed exclusive right to serve water through the "Plunkett Water Company." Eventually these two cases —SEC 8296 and SOC 24763—were consolidated and transferred to the South District.

The dispute, as finally presented at a trial which started in January 1975, involved plaintiff's horse grazing activities, his water company, the use of his property for illegal multiple residential uses and the maintenance on his property of structures which did not conform to defendant's code. On appeal, plaintiff pays no attention whatsoever to the 200 pages of findings of fact and conclusions of law. We accept those findings as the basis for our own statement of facts.

FACTS¹

Since 1945 plaintiff has owned several parcels of land known as 6101 through 6133 Ibbetson Avenue in Lakewood. These parcels were part of unincorporated

¹Any straightforward presentation of the facts legal issues involved in this case masks the unique character of these proceedings. We quote from the trial court's announcement of intended decision: "The trial of this matter has been rendered novel, if not bizarre, by the unique and almost experimental approach taken to each issue in the entire case by counsel for the plaintiff. Like a football team that disdains any and all offensive plays, but relies entirely on the prospect of intercepting its opponents' forward passes and running them for touchdowns, the plaintiff here refused to put on any evidence, indicating that he wished to reserve the right to put on rebuttal evidence if he later chose to do so. This, of course, was inconsistent with the provisions of Code of Civil Procedure Sections 631.7 and 607, . . .

territory of Los Angeles County until September 1962, when the parcels were annexed by defendant City. Until 1962, the parcels of land were subject to county zoning, building, use and health regulations.

In 1956, the parcels were subdivided into seven lots. Adjacent to these lots is a piece of land known as the Southern California Edison right-of-way. Plaintiff,

"This placed defendant City in the position of having to proceed with the presentation of evidence on its cross-complaint. The first witness that the City called was the plaintiff, Donald R. Plunkett, under Evidence Code Section 776. It was stipulated by his attorney that he was the plaintiff and cross-defendant. The city attorney then asked the plaintiff if he were the owner of the lots mentioned in the cross-complaint. At this point, the plaintiff refused to answer on the ground that any answer that he might give would tend to incriminate him, and that he claimed his constitutional rights under the Fifth Amendment.

"Both in chambers on the day before evidence began and in open court, the Court, laboring under the impression that the [plaintiff], in good faith, would want to prove to the Court that the property was in compliance with the city ordinances, suggested that the court, with the attorneys and the plaintiff, view the premises. This met with an adamant refusal on the part of the plaintiff. . . .

"[T]he entire case of the plaintiff consisted of a massive effort either to exclude the City's evidence entirely or to cast some aspersions upon the evidence which the City produced, or upon the City officials who gathered it. In short, it was tried as criminal cases are often tried—that is, with no evidence being given by the defendant or on his behalf (in this case, the plaintiff), the strategy being to exclude, reduce or impair the evidence of the prosecution just enough to create reasonable doubt.

". . . After the Defendant/Cross-Complainant City had concluded its evidence and rested, the plaintiff again had an opportunity to offer rebutting testimony, there was not one word of testimony by or on behalf of the plaintiff to the effect that the alleged violations did not exist. . . . As it did quite often during the trial, the Court again emphasizes that it should be remembered that this is not a criminal trial. This is a civil trial . . . in which no money penalties or damages or expropriations of property, or title to property are being sought by either side . . . Even more productive of amazement is the fact that it was the plaintiff, Mr. Plunkett, who instituted this litigation, and that the City's cross-complaint was triggered by the lawsuit filed by Mr. Plunkett."

over the years, has had a license from the Edison Company to graze animals. The license, most recently renewed by a January 1973 written agreement, limits the number of animals that plaintiff can maintain on the property. It appears that the grazing of animals is no longer an issue in this case.

During the period that the property was in unincorporated county territory, the county building ordinance prohibited building construction without a permit and occupancy without a final inspection. The county code defined and regulated dwelling houses, accessory buildings and garages, and also required a permit to build a swimming pool. Under the county zoning, plaintiff was permitted only one single family residence for each 5000 square feet of buildable lot area. There were also restrictions on the renting of rooms to boarders and the use of detached living quarters for temporary guests. The county ordinance required at least one automobile storage space accessible from the street and limited the capacity of garages or carports to three automobiles.

Between 1947 and 1953, plaintiff built, with county approval, six single family residential houses and garages and one house and garage to which he was entitled to county approval.

The county had also approved several other structures on plaintiff's property. Plaintiff also built a number of "garages," for which he had obtained building permits, but had not obtained a certificate of occupancy, after a final inspection. These garages and rooms in the houses were used for multiple residential purposes.

When the property was annexed by defendant City, plaintiff knew that he was using his property in viola-

tion of county regulations, having been advised in writing on several occasions that such uses were illegal. These uses were also illegal under the city code.

When the findings were signed, plaintiff was renting rooms and apartments created from the houses and garages on his property, and had constructed several buildings without a permit in violation of side and backyard requirements.

Plaintiff at all times was well aware of the applicable County Ordinances and City Code. He presented no evidence whatsoever that any of the illegal uses were valid, nonconforming uses. Plaintiff constructed a four foot chainlink fence in violation of the 42" height limitation of the city and also constructed a 6' fence in violation of applicable laws "with the purpose and intent of maintaining therein his own domain, immune from City regulation, inspection or City laws." There was no evidence that the city was harassing plaintiff; to the contrary, the city demanded only reasonable compliance with its building and zoning laws. Plaintiff was twice found guilty in the municipal court of violating defendant's code, but did nothing to correct the violations. The continual maintenance by plaintiff of the structures and uses in violation of the Municipal Code is a public nuisance.

Plaintiff was, in short, enjoined from continuing his illegal uses.

Plaintiff owned a water system known as the Plunkett Company for which he had obtained a certificate of public convenience and necessity from the Public Utilities Commission. The water company is a privately owned public utility. Plaintiff provided service to a nursery for two months in 1972. Then the nursery

obtained water service from defendant City. Plaintiff never dedicated his facilities to the public use and defendant City did not extend its water service to any area dedicated to the public use by plaintiff.

The judgment provides, in summary, that plaintiff is enjoined from constructing, using, occupying or maintaining more than one single family residence on any of the seven lots; must provide for each lot a garage or carport with at least two storage spaces; must provide in connection with the construction of any new building or alteration of an old building a side yard and rear yard in accordance with the city's code; must, after the present license to use the Southern California Edison Company right-of-way expires, maintain animals on such property only in accordance with the city's code; may not occupy any building or structure unless and until a certificate of occupancy is obtained; may not use the properties for other than a single family residence with specified limitations on roomers or boarders; must reconvert several former garages to garages; must remove a carport installed so that the use of a garage is not blocked; must remove a solid wall illegally built; and must obtain a permit for a swimming pool on the premises.

DISCUSSION

The bulk of plaintiff's brief on appeal is devoted to challenging evidence allegedly obtained in violation of his constitutional right. None of his contentions has merit.

1. *Testimony of Charles Chivetta*

In May or June 1971, Charles Chivetta, Director of Community Development for defendant city, met with the city attorney, plaintiff, and plaintiff's attorney

to discuss the problems concerning plaintiff's property. Plaintiff's attorney suggested, without any objection from plaintiff, that they should all meet on plaintiff's property at a certain time. At that time Chivetta inspected the premises. At trial, he testified to his observations in walking through the property.

Plaintiff contends that this evidence was inadmissible because Chivetta's observations were made in connection with a possible compromise of plaintiff's difficulties with defendant city. Plaintiff relies on Evidence Code section 1152, which makes inadmissible evidence that a person has, "in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, . . ."

There is no merit to plaintiff's contention. We leave aside whether section 1152 could ever apply in a situation like this. That the negotiations between plaintiff and defendant themselves constituted an attempt at a "compromise," reflects only plaintiff's later characterization of events. All the evidence shows is that defendant, consistent with the standard procedure in enforcing zoning laws insisted on examining the property to determine precisely what violations existed and what would have to be done to obtain compliance.

2. *The Helicopter Overflights*

In November 1969, Michael White, an assistant to Chivetta, while making a general aerial patrol of the city, noticed structures on plaintiff's property which appeared to fill yard areas that were required to be

unobstructed. In 1970, he flew over plaintiff's property in a police helicopter and then made another flight to take photographs.

There is no merit to plaintiff's contention that the overflights constituted an invasion of his privacy. First, the initial patrol overflight was not a search. (*People v. Superior Court [Stroud]* (1974) 37 Cal.App.3d 836, 839; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 117-118.) Moreover, plaintiff cannot have a reasonable expectation of privacy with respect to objects as conspicuous as garages and residence (*People v. Mullins* (1975) 50 Cal.App.3d 61, 68-69; *Dean v. Superior Court, Supra*, 35 Cal.App.3d at pp. 117-118; cf. *People v. Sneed* (1973) 32 Cal.App.3d 535, 542-543.)

Observations From Edison Property

Charles Chivetta photographed the rear of plaintiff's property from the Edison right-of-way. Plaintiff contends that evidence based on Chivetta's observations and photographs from the Edison right-of-way should have been suppressed because the city obtained the Edison Company's consent by coercion. There is no merit to that contention. Charles Chivetta wrote to John Overmeyer, a representative of the Edison Company and informed the Edison Company, in substance, that plaintiff was unlawfully keeping horses on property controlled by Edison and if the city were to file a complaint, Edison would be named as a party. Rather than coercion, the Edison Company's willingness to permit defendant's representative on its property reflects only a desire to obey the law or a desire to cooperate with the city because the company knew it was not disobeying the law.

Exclusion of Evidence

Plaintiff's theory throughout was that he had been the subject of discriminatory enforcement of zoning violations. In this connection, Charles Chivetta testified that after an initial building permit has been issued, the procedure "within the last year and a half or two years is, where practical" again that the building clerk would check the files to determine which permits were "not finaled" and the inspector would then send a notification to the property owner. Plaintiff's attorney asked Chivetta whether the city had "brought any actions, civil action, to force persons to get final permits when those persons have not been notified by mail under your notification system to get a final permit?" Defense counsel objected; the objection was sustained.

Contrary to plaintiff's contention, the trial court properly excluded the evidence under section 352 of the Evidence Code. The relevance of the evidence was, as the trial court said, "very tenuous, if any, . . ." Assuming that the evidence would have shown that defendant city never brought a civil action to require persons to get a final permit without first notifying those persons by mail, that would have made no difference to this case. Defendant city never filed an action against plaintiff in this case; when it responded by answer, affirmative defense and cross-complaint to the action filed by plaintiff, the parties were well past the notification stage. Besides, the city's request for injunctive relief in the form of requiring plaintiff to obtain final permits was only one part of a package of relief sought in face of plaintiff's obdurate use of his property in violation of applicable zoning, building use and occupancy regulations and loss.

Statute of Limitations and Laches

There is no merit to plaintiff's contention that the city's cross-complaint was barred by the statute of limitations. Where continuing zoning violations are involved, the statute of limitations does not run against a public agency. (*Fontana v. Atkison* (1963) 212 Cal.App.2d 499, 509.) Plaintiff also contends that the city's action is barred by the equitable doctrines of laches, estoppel, unclean hands and economic waste. None of these claims have merit.

First, there is no evidence that any city official was aware of the violations in 1962. Apparently, it was not until Michael White's helicopter flight in 1969 that the violations became apparent. This was at least in part because plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property.

Although plaintiff complains that some records are gone, he does not explain how he has been adversely affected.²

²Although plaintiff does not sort out the details of the injunctive relief granted to defendant, in fact that relief relates chiefly to enjoining plaintiff from continuing to use his property for multiple residence uses. Thus, whether as plaintiff contends, certain permits might have been lost, would not justify a court in permitting plaintiff to continue with his illegal use of the property. Besides, plaintiff never offered any evidence whatsoever to suggest that he was, in fact, issued any final permits, the record of which the city has lost.

Plaintiff's assertion that his hands are clean and the city's dirty, is totally contrary to the record which shows, at worst, that defendant city once served a search warrant on plaintiff which turned out to be not in legal form. The warrant was never executed and any impropriety in connection with its issuance did not result in evidence offered in this case. Rather, the record shows plaintiff's continuing refusal to abide by any law concerning the use of his property with which he disagrees. Finally, there is no evidence that plaintiff is being required to "remove and destroy buildings constructed according to pre-

Nonconforming Use

Plaintiff contends that he has a valid nonconforming use. Plaintiff appears to be referring to first, a second garage which blocks the usability of another garage for its lawful purpose; second, the requirement that garages be used for garage purposes; third, the requirement that each lot be provided with a usable two-car garage; fourth, the requirement that he remove a chainlink fence; fifth, the requirement that he restore a gate between two lots; and sixth, the requirement that he remove any structure which prohibits a five foot side yard. Plaintiff contends that these structures all conform to Los Angeles County zoning ordinances.

First, whether or not any of plaintiff's uses and structures were lawful when his property was subject to Los Angeles County regulations, plaintiff exaggerates the scope of the judgment enjoining him from certain activities. He is required to provide for side yards and back yards only when he alters or adds buildings. He is required only to close existing gates and community facilities. He is required to remove all chainlink fencing in excess of city height limits, only if he does not obtain a conditional use permit.

Second, contrary to plaintiff's assertions, his use of garages as apartments and conversions of those garages to apartments or other multiple family uses was never lawful, and the county required that each residence have a garage or carport with access to the street. Third, with respect to the city's requirement of two-car garages, plaintiff offered no evidence from which

existing code provisions. . . ." He is being asked to remove a chainlink fence and a brick wall. His assertion that removal of those structures "serves no purpose" is just a restatement of plaintiff's disagreement with the zoning and building laws.

it could be concluded that such requirement would be burdensome. Indeed, for all we know, plaintiff's illegally converted garages may, when restored to their lawful condition, satisfy city requirements.

Compensation for Taking of "Public Utility"

There is no merit to plaintiff's contention that he was entitled to compensation as a privately owned public utility when the city extended service to an area which he claims as his service area. (See Pub. Util. Code, §§ 1501-1506.)

To be entitled to compensation, plaintiff was required to show that the "service area" of which he was deprived was served by a privately owned public utility in which the facilities had been dedicated to public service, and in which he was required to render service. (Pub. Util. Code, § 1502, subd. b.) Plaintiff made no such showing.

We note, in closing, that plaintiff's contention that the evidence does not support the finding that his premises are a nuisance is frivolous.

Affirmed.

NOT FOR PUBLICATION.

Kaus, P. J.

We concur:

Stephens, J.

Ashby, J.

Homer H. Bell, Judge

Superior Court of Los Angeles County

Donald M. Re, Attorney for Plaintiff, Cross-Defendant and Appellant, Donald R. Plunkett.

John Sanford Todd, City Attorney, for Defendant, Cross-Complainant and Respondent, City of Lakewood.

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building,
San Francisco, California 94102.

Jan. 19, 1978.

I have this day filed Order

Hearing Denied

In re: 2 Civ. No. 49610, Plunkett vs. City of Lakewood.

Respectfully,

G. E. Bishel
Clerk